No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of N. H. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF ON THE PART OF APPELLEE

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Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

This is an action brought by the Trustee of the Estate of N. H. Hickman, Bankrupt, to set aside a transfer of personal property (73/128 interest in the American Schooner "William Olson") made for a good, valuable and adequate consideration by the Bankrupt to Appellee herein within four months before his adjudication as a Bankrupt on a Creditor's Petition.

The only issue made by the pleadings in this case and the only issue to which evidence was directed at

the trial is: Did the defendant know or have reasonable cause to believe that, at the time of the transfer of the property to her, such transfer would effect a preference.

As stated by Appellant's counsel at the trial, the burden was on him to prove the affirmative of this issue, and, while he had no direct evidence to offer in its support, he would endeavor to make out his case by *inference*. In this attempt, we submit he has failed utterly.

His chief witness, Mr. Greenwald, by far the largest creditor of Mr. Hickman, stated merely that he had business relations with Mr. Hickman from 1890 or 1891 continuously up to the adjudication in bankruptcy and that he had known for a number of years prior to the adjudication, (forced by him), that Mr. Hickman was insolvent. He also stated that Mr. Hickman had been, by reputation, insolvent for a number of years, but it was very evident at the trial that Mr. Greenwald's opinion in this regard was based wholly on his own belief. He knew that Mr. Hickman had been actively engaged in various business enterprises at all times up to his adjudication and he had himself been largely interested with Mr. Hickman in at least some of these enterprises. In fact, Mr. Greenwald admitted that he had sold to Mr. Hickman, only a year or so before beginning the bankruptcy proceedings, the very property which he now seeks to get back in this proceeding.

Mr. Greenwald had never at any time had any communication in any manner with the Appellee con-

cerning Mr. Hickman's affairs. The agreement signed by the Appellee in the latter part of 1915, and introduced in evidence by Mr. Greenwald simply recites that both Mr. Greenwald and Appellee had advanced money to the Bay Shore Drayage Co., a corporation, in which both Mr. Hickman and Mr. Greenwald were interested, and that Appellee agreed that Mr. Greenwald should be repaid his loan before she should claim repayment. From this, no inference can possibly be drawn that Appellee knew or had reasonable cause to believe or even to suspect that Mr. Hickman was in financial difficulties. One creditor's postponing payment in favor of another is a common, every day business occurrence and is surely no evidence of a debtor's insolvency. If anything, it merely goes to show that Mr. Greenwald was keener in his business dealings than was the Appellee—a thing to be expected of an experienced business man as against an elderly woman with no business experience whatever. Mr. Greenwald, also, by this agreement was seeking a *preference* and got it. No one is complaining of that.

The Appellee, called as a witness in her own behalf, directly and positively stated that she knew nothing of Mr. Hickman's business affairs and never had the slightest reason to suspect his solvency up to the time of his adjudication as a bankrupt. She did not know and had no reasonable or any cause to believe that, at the time of the transfer of the schooner shares to her in payment of money borrowed from her amounting to $10,000, Mr. Hickman was insol-

vent or intended to effect a preference, or that such transfer would effect a preference in her favor. She is a widow of considerable means and has only two children, a daughter, Mrs. N. H. Hickman, and a son, James G. Nevins. She divides her time between her daughter's home in San Francisco and her son's in Vallejo, and is put to very neglible expense in living. In the course of a long cross-examination, she described her mode of living and the disposition of her income. She has for many years past loaned money both to her son and her son-in-law which they repaid as they saw fit. She knows nothing of her son's business affairs or of her son-in-law's. They do not discuss them with her. The fact that neither her son nor her son-in-law discusses business matters with her is not at all surprising. Men commonly do not discuss such matters with the feminine portion of their households.

She further testified that in all the years during which she had lived with her son-in-law, there was no change in his mode of living. No evidence of any kind which would lead her to believe that he was in failing circumstances. Now and again she bought a dress for her daughter or a toy for her daughter's son, or some trifle for their home because it pleased her to do so.

The testimony in this case was wholly oral and was all taken in the presence of the trial court. It is set forth in full in the transcript on appeal herein. As this court will read the whole of it we do not propose to do as Appellant has done—cull extracts from it

which we might conceive to be most strongly in our favor.

As is constantly repeated in the numerous reported cases of this kind, each case stands on its own circumstances, and we are content to rest our case on the evidence adduced at the trial. As it is clearly and tersely stated by the trial court, in its opinion in this case,

> "there is nothing in the evidence that would warrant the court in finding that she, (the Appellee) had reasonable cause to believe, or even to suspect that her son-in-law was insolvent at the time of the transfer which plaintiff seeks to set aside."

Authorities.

Subdivision b. Sec. 60 of the Bankruptcy Act (U. S.) 1898, as amended in 1910, reads as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or if the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment and transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he

> may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

See *Collier on Bankruptcy,* (10th Ed.) pp. 820 et seq.

Remington on Bankruptcy, Vol. II, Sec. 1405 et seq.

Out of the vast number of cases which might be cited as supporting our case we cite only a few which, by reason of their facts or the discussion of Subdivision "b" of Section 60 of the Bankruptcy Act, most closely conform to the case at bar.

> The burden of proof of the existence of the reasonable cause of belief that the transaction would effect a preference is upon the trustee. *Soule vs. Ashton First National Bank,* (1914) 26 Idaho 66, 140 Pac. 1098.

In *Grant vs. National Bank,* 97 U. S., page 80, the leading case on the question of transferee's knowledge or belief, Mr. Justice Bradley, in delivering the opinion of the Court, uses the following language:

> "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the fram-

> ers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose."

This language has been constantly quoted with approval in many cases decided since.

See *Getts vs. Janesville & Co.,* 163 Fed. Rep. 417, page 419.

Sparks vs. Marsh, 177 Fed. Rep. 739, page 743.

> "The fact alone that a creditor knows his debtor to be financially embarrassed and is pressing for payment of his claim is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent and that a transfer of property to him as security is intended as a preference."

Syl. Sharpe vs. Allendar, 170 Fed. Rep. 589, Affirming S. C. 164 Fed. 448.

In Re Goodhile, 130 Fed. 471.

Calhoun Co. Bank vs. Cain, 152 Fed. 983.

Reba vs. Shulman, 183 Fed. 564, Affirming 179 Fed. 574.

> "A more difficult question arises respecting the existence of reasonable cause on the part of Appellant at the date of the instrument to believe that his transaction with the bankrupt would, if carried out, effect a preference. Every question of this kind is necessarily controlled by the facts and circumstances of the particular case. Aside from some principles that have general application, it rarely happens that the facts and circumstances of other cases, even though kindred in character, are helpful in solving the question in hand.
>
> "(4) Thus it is a general rule that mere suspicion on the part of the creditor that his debtor is insolvent or that the effect of a given transaction with him would amount to a preference is not enough (First National Bank vs. Abott, 165 Fed. 852, 859, 91 C. C. A. 538 (C. C. A. 8th Cir.); Stucky vs. Masonic Savings Bank, 108 U. S. 74, 75, 2 Sup. Ct. 219, 27 L. Ed. 640), for, in the absence of substantial evidence in that behalf, his suspicions are fairly consistent with the ordinary desire of the creditor to assure himself of safety respecting the debt."

Carey vs. Donohue, 209 Fed. 328 at p. 331.

> "A creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law."

Syl. Stucky vs. Masonic Bank, 108 U. S. 74.

Soule vs. Ashton First National Bank, 140 Pac. 1098.

"Bankruptcy—303 (1)—Preferences—Burden of Proof—"Reasonable Cause to Believe."

> In view of the definition of insolvency contained in the present Bankruptcy Act, a trustee, suing to recover payments alleged to have been voidable preferences, must show that the defendant had reasonable cause to believe that the bankrupt's property at a fair valuation was less that its indebtedness at the time of the payments, and this would seem to require either actual knowledge of the property and debts on the part of the person receiving the alleged preference, or knowledge by him of circumstances warranting the inference that the debts probably exceeded the property."

Clifford vs. Morrill, 230 Fed. 190.

Comments

All the cases cited by Appellant from the Federal Reporter and from the American Bankruptcy Reports, with one exception, are decisions of the District Courts, that is, of the trial courts, and are decisions on the facts as presented. The one exception, Coder vs. McPherson, 152 Fed. Rep. 951, is a decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the District Court's reversal of the *Referee's decision on the facts.*

We do not dispute the statements of the law made in all these cases, or in the few other cases cited by Appellant, which are mostly old cases decided before the present bankruptcy law was enacted, and have no

reason to believe that the Courts came to other than right decisions on the facts. In the case of Wright vs. Sampter, freely quoted from by Appellant as favorable to him and cited as from 150 Fed., although it is in fact reported in 152 Fed. Rep. 196, the District Court held that the transferee received property from the bankrupt, her uncle, without knowledge or suspicion of his bankruptcy and dismissed plaintiff's bill. The last sentence in the Court's opinion is as follows:

> "There is nothing in this cause, except the bare fact that Miss Sampter did not demand or expect payment, to indicate participation on her part in the fraud of her uncle, and that bare fact, even plus the relationship, is not enough to turn the scale against her; it is evidence, nothing more, and on the whole evidence she must be absolved."

On page 26 of his brief Appellant, for the first time, makes the statement that Mrs. N. H. Hickman, the daughter of the appellee, was her agent and that Appellee is therefore chargeable with any knowledge Mrs. Hickman may have had of her husband's affairs.

This is transparently a desperate attempt to support a lost cause. There is absolutely no evidence in the case that Mrs. Hickman was her mother's or her husband's agent and the fact is not so. If it were so, Appellant could easily have proven it by simply asking Mrs. Nevins the question or by calling Mrs. Hickman as a witness. She was present in the Courtroom during the whole trial under subpoena from Appel-

lant but he did not choose to call her. At most, as the slight indirect evidence concerning Mrs. Hickman shows, she acted simply as the husband's messenger or "errand boy" in the matter and in no sense as Mrs. Nevin's agent.

In conclusion, we repeat that this case is wholly one of fact; that the trial court had all the evidence before it and heard all the witnesses and that its decision on the facts was correct and should not be disturbed.

Respectfully submitted,

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Attorneys for Appellee.

Dated, San Francisco, Cal.,
March 12, 1917.